IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20-12-2006

CORAM:

THE HONOURABLE MR.JUSTICE R.REGUPATHI

Crl.O.P.Nos.26251 to 26254 of 2004 and
Crl.O.P.Nos.26403 and 26404 of 2004 and
Crl.M.P.Nos.8376, 8378, 8380, 8382,
8389 and 8391 of 2004

M.M.Sabharwal .. Petitioner in
Crl.O.P.Nos.26251, 26252
and 26404 of 2004

R.P.Billimoria .. Petitioner in
Crl.O.P.Nos.26253, 26254
and 26403 of 2004

Versus

M/s.Mahalakshmi Real Estates
and Investments
(P) Limited, rep. By S.G.Srinivasan,
C-Block, VI Floor,
Flat No.5, Gemini Parsn
Apartments, 599 Anna Salai,
Chennai-600 006. .. Respondents in
all the Crl.O.Ps.

Prayer: Petitions filed under Section 482 Cr.P.C seeking to call for the records in C.C.Nos.4308, 4309, 4307,4308,4309 and 4307 of 2004 now pending on the file of the VII Metropolitan Magistrate Court, George Town, Chennai and quash the same.

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For Petitioners : Mr.C.Mohan for
M/s.King and Patridge

For Respondent : Mr.N.P.Jayakumar

COMMON ORDER

The petitioners are A-5 and A-6 in C.C.Nos.4307, 4308 and 4309 of 2004 on the file of the learned VII Metropolitan Magistrate, George

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Town, Egmore, Chennai for an offence punishable under Section 138 of the Negotiable Instruments Act filed by the respondent/complainant.

2. The cheques in question in all these cases were issued during 2004. After observing formalities, the cases have been taken cognizance by the learned Magistrate.

3. Learned counsel appearing for the petitioners submit that there are no specific allegations and averments in the complaint against the petitioners. The petitioners have resigned from the first accused company on 01.10.1999 and 15.10.1999 respectively and during the course of the issuance of the cheques, the petitioners were no more the Directors of the Company.

4. That a statutory notice has been given on 21.01.2004 for which a reply has been given on 06.02.2004, denying the allegation that the petitioners are Directors of the Company. Along with the notice, copies of Form 32, submitted before the Registrar of Companies have also been sent. The same has not been taken into consideration and mechanically without application of mind it has been alleged that the petitioners have consented and connived for the commission of the offence.

5. Learned counsel appearing for the petitioners relied on a case reported in 2006 (4) CTC 529 (B.Raman and others Vs. Shasun Chemicals and Drugs Limited rep. By its Company Secretary, No.3, Doraiswamy Road, T.Nagar, Chennai-600 017, wherein it has been held as follows:

> "The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138. By sending a notice to the Company as well as the persons in charge of and responsible for the conduct of the business of the Company, he can make a demand, asking them to pay the amount. Some may reply that they are not in charge of and responsible for the conduct of the business of the Company. Some may reply that they are not connected with the Company in any way and some may rectify the omission, by making efforts to pay the amount to the payee, in the name of the Company. In that event, the complainant may either drop the action of filing the Complaint or, in the event of non-payment of the cheque amount, he may choose the persons, who are really responsible for the commission of the offence and, then, initiate prosecution against them.
>
> 27. When it is a settled law, as laid down by the Supreme Court, that there must be a specific averment in the complaint against the accused persons to the effect that they

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are in charge of and responsible for the conduct of the business of the Company, during the relevant time the offence has been committed, with their connivance, i.e., all the more reason, the complainant shall give an opportunity to those persons to explain the complainant about their position in the Company. In other words, the complainant can prosecute the company as well as the other Directors, only when he is satisfied that the persons, sought to be prosecuted, are in charge of and responsible for the conduct of the business of the Company and also, in spite of the demand of the cheque amount through service of notice, they have not chosen to pay the amount within time."

6. Learned counsel relied on the following decisions to substantiate that there are no allegations and averments in the complaint to substantiate that the petitioners are in charge of and responsible for the conduct of the business of the company.

1. 2001(10) SCC Page 218 (K.P.g.Nair Vs. Jindal Menthol India Limited)
2. 2004(4) CTC Page 317 (SC) (Monaben Ketanbhai Shah Vs. State of Gujarat)
3. 2005(3) CTC Page 380(SC) (S.V.Majumdar Vs. Gujarat State Fertilisers Company Limited)
4. 2005(5) CTC Page 65(SC) (S.M.S.Pharmaceuticals Vs. Neeta Bhalla)
5. 2006(4) CTC Page 43 (Lachhman P.Udhani Vs. Redinton India Limited)

7. Per contra the learned counsel for the respondent/complainant submits that prima facie materials are available to substantiate the allegations in the complaint. Specific allegations have been made that the petitioners are Directors of the company. The loan transaction with the complainant commenced during 1985 and it was continuing. At that time the petitioners were Directors of the company. They would have resigned subsequently. As they were Directors, originally, they must be taken as accused in the case and at any rate, these grounds could be agitated during the course of trial.

8. I have perused the materials available on record and heard the submissions made.

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9. The cheques in question have been issued during January 2004. By way of reply notice dated 06.02.2004 the complainant has been informed about the resignation of the petitioners as Directors. Copies of Form 32 submitted before the Registrar of Companies, to substantiate the resignation, also has been enclosed. In spite of that, such aspect has not been taken into consideration in the private

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complaint. It has been simply stated as follows:

> "A-4 to A-10 being Directors of the accused comlpany are involved in the day to day affairs of the management of the first accused. The cheques were issued with the consent and connivance of all the accused."

10. It has been held by this Hon'ble Court in *2006(4) CTC 529* that if an explanation is given to the statutory notice by way of reply, the same must be taken into consideration before filing of the complaint. In a similar situation, in a case reported in *2006(4) CTC 43* referred above, the case was quashed as Directors have resigned from the Company long prior to the issuance of the cheque.

11. Though Form 32 is a defence document, and such defence materials could not be looked into at the time of enquiry, exercising inherent powers under Section 482 Cr.P.C, if the materials are of unimpeachable and sterling quality, the same could be looked into for the purpose of quashing the proceedings. This proposition has been held in the judgment reported in State of Orissa Vs. Debendra Nath Padhi (2005(1) CTC 134:

> "It is evident from the above that this Court was considering the rare and exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under Section 482 of the Code.

12. The averments contained in Para 6 of the complaint are omnibus allegation and there is no specific allegation against the petitioners. In spite of intimation of their resignation during 1999 the same was not taken into consideration. In such circumstances, I find that the complaint against the petitioners is an abuse of process of law and liable to be quashed and accordingly the proceedings in so far as the petitioners are quashed. The learned Magistrate may proceed with the trial of the cases in accordance with law in so far as the other accused persons are concerned. These petitions are ordered accordingly. Consequently, connected Crl.M.Ps are closed.

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Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1.The VII Metropolitan Magistrate,
George Town, Chennai.

2.-do- thro' The Chief Metropolitan Magistrate,
Egmore, Chennai -8.

+6ccs to M/s.King & Partridge, Advocates Sr 64085 to 64090

+1cc to Mr.N.P.Jayakumar, Advocate Sr 64877

GB (CO)
km/20.1.

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